

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7017
Summary Calendar

ALBERT LEE GRAHAM,
individually and on behalf of his minor children,
ALVIN L. GRAHAM, ALFRED L. GRAHAM, ARRON L. GRAHAM,
ASHLEY L. GRAHAM, AL L. GRAHAM, ADRIAN L. GRAHAM, and
ALAN L. GRAHAM,

Plaintiffs-Appellants,

VERSUS

RAY MABUS, as Governor of the State of Mississippi,
Beatrice Branch, Director of the Department of Human Services,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CAJ 91 472 L)

January 6, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Albert Lee Graham, a federal prisoner, appeals the dismissal of his § 1983 suit against Mississippi state officials for wrongful termination of Aid to Families with Dependent Children (AFDC)

¹Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

benefits to his minor children. We affirm.

I.

Albert Lee Graham, a federal prisoner, filed a § 1983 complaint against Beatrice Branch, Executive Director of the Mississippi Department of Human Services; Herbert Scott, director of the same department; and Governor Ray Mabus. In October 1989, the Mississippi Department of Human Services advised Graham's wife, Pearlie A. Graham, that she was no longer eligible for Aid to Families with Dependent Children (AFDC) benefits or food stamps because she maintained a bank account exceeding \$1000.00. She requested but failed to appear for a hearing in November to explain the excess funds in her account. According to Graham, he sent the money to Pearlie for safekeeping while he was in prison and it did not belong to her. As a result of the termination, one of the children born with a birth defect did not receive a necessary operation.

Graham asserted that he could not be held liable for the acts of his children's mother. He further complained that the defendants violated his children's rights under the Due Process and Equal Protection Clauses because the benefits were terminated, not through their wrongdoing, but because of their mother's actions. Graham sought reinstatement of AFDC benefits, food stamps, and Medicare (sic); injunctive relief; damages for the costs of his child's operation; punitive damages; compensatory damages for his pain and suffering and for his children's pain and suffering; and a declaratory judgment.

The court partially granted the defendants' motion to dismiss, concluding that although Graham lacked standing to sue in his own behalf, he was entitled to sue on behalf of his children. The court also found that Graham's claim for the reinstatement of benefits to his children was rendered moot because the Department of Health and Human Services had reinstated the benefits in July 1991. The court concluded, however, that the claim that the children were entitled to monetary damages because they were deprived of a statutory entitlement without due process of law was not moot. The defendants then filed a motion for summary judgment. The court granted that motion.

II.

A.

This Court conducts a **de novo** review of a district court's grant or denial of summary judgment. **Reese v. Anderson**, 926 F.2d 494, 498 (5th Cir. 1991). Although fact questions are considered with deference to the non-movant, Rule 56 "requires the entry of a summary judgment against the party failing to make a showing sufficient to establish the existence of an element essential to that party's case." **L & B. Hosp. Ventures, Inc. v. Healthcare Int'l, Inc.**, 894 F.2d 150, 151 (5th Cir.), **cert. denied**, 111 S. Ct. 55 (1990) (citing **Celotex Corp. v. Catrett**, 477 U.S. 317, 322-24 (1986)).

B.

Graham argues first that the district court erred in granting summary judgment because the defendants discriminated against his

illegitimate children, thus violating the Due Process Clause and the Equal Protection Clause. Graham complains that discrimination against the children is invidious because the harm they suffered resulted not from their own action but from their mother's wrongful action.

"[E]qual protection analysis requires strict scrutiny only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." **Massachusetts Bd. of Retirement v. Murgia**, 427 U.S. 307, 312 (1976) (footnotes omitted). Graham's alleged class of children who are denied AFDC benefits because their mothers have excess qualifying resources is not a suspect class. Nor does this classification impermissibly interfere with the exercise of a fundamental right. Thus, the statute's classification need bear only a rational relationship to a legitimate legislative end. **See Hatten**, 854 F.2d at 691; **Cleburne v. Cleburne Living Center, Inc.**, 473 U.S. 432, 440-42 (1985).

Under the federal statute governing the determination of AFDC benefits, a state may withdraw AFDC benefits if a recipient's qualifying resources exceed \$1000.00. **See** 42 U.S.C.A. § 602(a)(7)(A)-(B) (West 1991). The Mississippi statute governing the determination of benefits permits the state to review the need for assistance as frequently as it deems necessary and to withdraw or change assistance if it finds that a child's circumstances has changed. **See** Miss. Code Ann. § 43-17-19 (1981). The Supreme Court has held that because of limited state resources for the welfare

program, states have great latitude in determining how to dispense available funds among needy children. **See Dandridge v. Williams**, 397 U.S. 471, 478 (1970). Consequently, the AFDC and Mississippi statutes that limit benefits to children whose mothers' qualifying resources do not exceed \$1000 are rationally related to their legitimate ends and do not violate the Equal Protection Clause. As the district court noted, it is certainly rational to conclude that income and resources available to the custodial parent will be used for the benefit of that parent's children. **See id.** at 479.

Graham also complains that the defendants violated the Due Process Clause when they arbitrarily denied his children their benefits without investigating the consequences of such action. Graham fails to show, however, that the defendants acted arbitrarily given their statutory authority to terminate Pearlie Graham's benefits.

In support of their motion for summary judgment challenging Graham's procedural due process claim, the defendants supplied the affidavit of Brenda Rembert, an assistant to the director of the Division of Economic Assistance in the Mississippi Department of Human Services. Rembert attested to information contained in Pearlie Ann Graham's case record. The case record reflects that Graham was notified on September 18, 1989 that information was needed by September 28, 1989 regarding the deposit of \$14,000 into her savings account. Pearlie Graham was notified on October 5, 1989, that both her food stamp case and her AFDC case would be closed effective November 1989. Pearlie requested a hearing on

October 9, 1989, and received notice that the hearing was scheduled for November 15, 1989. When she did not appear, the hearing was considered abandoned. Rembert attached to her affidavit authenticated copies of all the notices sent to Pearlle. The district court correctly rejected Graham's procedural due process claim because Pearlle Graham was granted, but failed to exercise, an opportunity to be heard.²

C.

Graham complains next that the defendants violated a ruling issued by the United States Commissioner of Social Security providing that a state may not deny assistance to a needy child because home conditions are unsuitable. Section 1983 can be used to enforce federal statutory rights such as those provided by AFDC. **See Wilder v. Virginia Hosp. Ass'n**, 496 U.S. 498, 508 (1990). Even if Graham competently states the ruling, and even if violation of such a ruling is cognizable in a § 1983 action, Graham does not show that the ruling was violated. Pearlle Graham's benefits were not terminated because of unsuitable living conditions, but because of excessive resources.

D.

Graham argues next that 42 U.S.C.A. § 404(b) (West 1991) bars the Government from making adjustments or recovering incorrect payments from individuals who are without fault in receiving them.

² In his reply brief, Graham also complains that the defendants denied the children procedural due process. This Court, however, does not address issues raised for the first time in a reply brief. **United States v. Prince**, 868 F.2d 1379, 1386 (5th Cir.), **cert. denied**, 493 U.S. 932 (1989).

This statute has no application because no adjustments or incorrect payments were made to Pearlie Graham.

E.

Graham complains finally that the defendants failed to follow **Cooper v. Laupheimer**, 316 F. Supp. 264, 268 (E.D. Pa. 1970) by depriving his child of AFDC funds because of parental misconduct. He contends that an otherwise needy child cannot be deprived of necessities because of his mother's budgetary mismanagement, unless the state provides other care and assistance. **See id.** at 269-70. He also points to 42 U.S.C.A. § 604(b) (West 1991), which provides that a state can withhold benefits from a needy, dependent child only if it provides other care and assistance. Graham fails to show, however, that his children remained "needy" within the definition of the statute once their mother's qualifying resources exceeded \$1000.

The district court correctly granted summary judgment.

AFFIRMED.